

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x

15-CR-213 (SJ)

3 UNITED STATES OF AMERICA,

United States Courthouse
Brooklyn, New York

4 Plaintiff,

5 -against-

December 15, 2016
11:00 a.m.

6 NOELLE VELENTZAS and ASIA SIDDIQUI,

7 Defendants.

8 -----x

9 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE STERLING JOHNSON, JR.
10 UNITED STATES SENIOR DISTRICT JUDGE

11 APPEARANCES

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24 Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 THE COURTROOM DEPUTY: U.S. versus Velentzas and
2 Siddiqui.

3 THE COURT: Note your appearances.

4 MS. SASSO: Good morning, Your Honor, for the United
5 States, Jennifer Sasso, Alex Solomon and Douglas Pravda.

6 MR. SWIFT: Good morning, Your Honor, for
7 Ms. Siddiqui, Charles Swift.

8 MR. MAHER: Good morning, Your Honor, Sean Maher for
9 Ms. Velentzas.

10 THE COURT: Okay. Whose motion is this?

11 MS. SASSO: Your Honor, there is a motion by the
12 defendant and a response by the government as well as a cross
13 motion by the government and a response by defendant.

14 THE COURT: Let's hear from the defendant.

15 MR. SWIFT: Yes, Your Honor, we filed letters with
16 this court requesting to use -- notifying under the protective
17 order --

18 THE COURT: I got the letter. You have information
19 that you say is the undercover in this case.

20 MR. SWIFT: Yes, we do.

21 THE COURT: I don't know if the government answered
22 or not, but if they do answer they are going to confirm or not
23 confirm and you want to use this information.

24 MR. SWIFT: Yes, it was independently obtained by
25 myself and my own investigation. It was not obtained through

1 discovery and no portion did I get it through discovery. I
2 obtained it through public sources, and then investigating
3 those public sources.

4 This case was discussed in the Gothamist and from
5 that discussion I was able to draw down and discover the name
6 of the undercover informant by doing a little research.

7 THE COURT: Let me ask you this, assume you are now
8 conceding that this name that you did discover was the actual
9 undercover --

10 MR. SWIFT: Yes.

11 THE COURT: -- would that be classified if it were
12 given to you by the government?

13 MR. SWIFT: I don't know. That would be up to the
14 government to decide whether it was classified or not when
15 they gave it to me in the process, but they haven't given it
16 to me. And I would point you to the Seattle Times and The New
17 York Times on classified information, Your Honor.

18 The fact that it's classified, even if it is, if
19 they are restricted in some manner by the government controls
20 it when it's given in discovery. It doesn't control it when
21 it's independently obtained, that the First Amendment rights
22 and all the cases cited by the government have to do with
23 cases where they control the information and were giving it
24 out.

25 This is not the case here. In this case, I obtained

1 the information independently, through my own investigation,
2 as I am required to do as counsel. I found that and now I
3 want to further investigate it, because there's a protective
4 order because it's unusual --

5 THE COURT: When you say investigate, what do you
6 want to investigate?

7 MR. SWIFT: What I want to do is investigate this
8 person. On my way over I was reminded -- I was in law school
9 at the time that the OJ Simpson case went on, so I watched it.
10 And one of the most striking moments was F. Lee Bailey's
11 cross-examination of the chief detective. What he had done
12 was he had investigated that chief detective extensively. He
13 knew all about his background, about statements he'd made,
14 about things he had done in the past to discredit that
15 detective.

16 What I want to do is investigate this person in the
17 same way. I want to find out what they've done in the past,
18 statements they've made in the past, statements they've made
19 currently. As we point out in our letters, we see a potential
20 entrapment defense here. Their conduct in other ones will be
21 directly relevant to that and how they approached and what
22 they do in the undercover's operation.

23 There is also, as pointed out, several gaps in
24 taping where we're going to have rely on this undercover's
25 honesty. I would be like to be able to take a look at that

1 and confront them with instances where they have maybe not
2 been honest. To do that, I need to do a thorough
3 investigation.

4 THE COURT: What do you say of the government's
5 position of national security?

6 MR. SWIFT: The national security has no bearing on
7 the part. They say national security. We pointed to
8 Carmichael in the case. And in Carmichael -- it was a drug
9 case, they are correct on that, but the same interests are
10 absolutely present in a drug case. We could hardly say that
11 an undercover operative in the war on drugs, that their
12 effectiveness might be compromised if they were published.
13 That an undercover operative might suffer some speculative
14 risk if things were published. Nevertheless, the Court found
15 in Carmichael that those balances on a general part don't
16 outweigh it.

17 THE COURT: But you agree there was a balancing
18 test.

19 MR. SWIFT: I don't agree in Carmichael that they
20 really balanced it in the part. In the end when you take a
21 look at in the part they noted those things, but they went to
22 the First and Sixth Amendments where there was no balance
23 because it had been independently obtained.

24 All of the balancing tests that have been utilized,
25 Your Honor, have been from cases where the Court is using its

1 control of discovery, not applicable here. You're not
2 controlling discovery. You're not controlling anything that
3 was handed out by the government. You're controlling how the
4 defense investigates its case if you put the part on. You're
5 saying, you can look here but you can't look there. You can
6 do this, but you can't do that in preparing for trial. And
7 that's where the Court comes in.

8 And you're also restricting the speech, both of
9 Ms. Siddiqui and of myself in saying you can't say this to
10 anyone else even though none of it came to you from the
11 government, and that was the point in Carmichael. You can't
12 do that. Those rights are not -- I shouldn't say can't.
13 Those rights aren't subject to a balancing test here.

14 We looked at the Court's order, the plain language
15 of the Court's order and our own belief allowed us to do this,
16 I think the Court and the proper interpretation was the Court
17 wasn't ordering something that would be unconstitutional
18 inside the process, that the language of the order was open,
19 you know, simply required notification, which we've done.
20 We've provided notification.

21 And I would look to also here in the affidavit. The
22 affidavit on this part is simply a generic application. It's
23 generic in its process that it says, well, she has worked in
24 the past; yes, we know that, in part. And that she might be
25 generically at some level of risk. Every officer is at some

1 level of risk on the part here and to speculate and close down
2 these is inappropriate.

3 So I would point to three factors in closing. One,
4 the Court in approaching this must approach it from the
5 position -- and we would be, I admit, in a far different place
6 if the government had turned this over, but they didn't. They
7 didn't give that to me and to all the balancing tests on
8 undercover informants are when, presumably, the government
9 is -- or on the record of when the government is turning it
10 over. They didn't do that. I obtained it independently, as a
11 matter of both the protective order and courtesy 'cause want
12 the government -- you know, don't want to endanger anyone
13 inadvertently, told the government of our plan to go out and
14 canvass mosques and other places to find witnesses, which is
15 exactly what you would expect me to do.

16 If there were a key witness against my client who is
17 known in the community and I didn't investigate that, I would
18 be derelict, so that's what I'm going to do. I'm going to go
19 out to the community with investigators, post it and find this
20 person.

21 THE COURT: What do you say about the government's
22 application to close the courtroom?

23 MR. SWIFT: Again, now, there are three -- that's a
24 different set and there is well established black letter law.
25 Black letter law 1, 2 and 3.

1 The first part on it is that you look at how long
2 will the closure be, the requesting parties' interest in this
3 and how long will it be.

4 In this case, and in a lot of the cases that were
5 cited by the government, it was only a minor closure. This is
6 the principal witness. This will basically result in at least
7 a 50 percent, or maybe almost a hundred percent closed trial
8 during the portion of which would transform this courtroom --

9 THE COURT: It's not closed to the family of the
10 defendants, and it's beamed, as they say, to another room or
11 something.

12 MR. SWIFT: The broadcast part but we are still at a
13 level of a closed trial.

14 The second part though is where they really fall
15 down. They have not made, under the Second Circuit black
16 letter law, the tests that are required to do that. They have
17 not articulated a specific threat to this agent, unlike the
18 cases where they had testimony regarding specific threats that
19 had been made to this person, nor have they indicated a
20 ongoing, in the same area, investigation. In fact, when we
21 look at that declaration, what it says is we might use her in
22 the future.

23 Under those parts if the government's arguments are
24 accepted here, then any time an UC, an undercover agent
25 testifies, the courtroom is closed, because they could always

1 be testifying in the future, that's always possible.

2 And then we go to the next one part is they could
3 always have some level of threat. That's always possible.
4 There is no situation where it wouldn't be possible. So under
5 the government's arguments and the affidavit that they've
6 given here with no particularization, they should not close
7 the courtroom at this point. If the government has specific
8 parts on it that would be a fish of a different -- a different
9 kettle of fish, Your Honor, but they have not done that to
10 this point. And so our position is that the courtroom should
11 not be closed until the government puts this out.

12 And the last part I put out is that the government
13 ignores the fact that this witness -- I was able to discover
14 this witness because they've already had substantial
15 publicity.

16 And there is a prejudice to my client when the
17 courtroom is closed because it says to the people in that box,
18 that this is dangerous. That we have to close the courtroom.
19 There is a level --

20 THE COURT: Would that be resolved by curative
21 instructions?

22 MR. SWIFT: It certainly will help, but it does not
23 resolve the possibility. This is why there is a set of
24 factors that begin to balance it in her interests in an open
25 trial.

1 And again, where I sit at this, Your Honor, is
2 that --

3 THE COURT: Let me ask you this, if there were
4 family and people who are authorized to be in the courtroom,
5 how would the jury know that it was closed?

6 MR. SWIFT: In the sense -- in my sense as to date
7 none of my client's family members have attended anything.
8 And I don't anticipate that they will unless one or two might
9 be called as witnesses and excluded anyway.

10 I do anticipate that there will be spectators and
11 media on this trial, so the jury will see all of them ushered
12 out on the process. So the jury will have -- well, a fairly
13 good knowledge that something's going on here on the process
14 and they will be gone for the entirety of the undercover's
15 testimony.

16 And again, I'm not asking to use her actual name in
17 cross-examination as long as the government stipulates, should
18 I cross examine her about some things from her actual life,
19 that it's the same person. That she's not going to say, oh,
20 that's not me. I can handle that. I'm not trying to
21 broadcast her name. Her image is already out there. There
22 are no photographs allowed inside this courtroom. She
23 interacted in this community for years. So the part on it
24 seems to be somewhat speculative and it certainly prejudices
25 my client, coming back to each of those parts on it.

1 And I do, though, to come back to Your Honor as my
2 propose to the Court is, one, to allow us to investigate.
3 We're going to investigate. We did offer a compromise. My
4 need to investigate her in the community where my -- you know,
5 the Muslim communities in this area is to find other --

6 THE COURT: What do you say about the government's
7 offer to compromise.

8 MR. SWIFT: It is insufficient. If they are willing
9 to hand over all the people she's had contact with -- because
10 that's what I'm looking for. If they are willing to hand over
11 that list of names, she talked to these people, these are all
12 the people she's talked to, I'll go approach those people
13 independently. Because my part in doing this is to find those
14 people. And I agree they're really saving me a lot of work
15 and I wouldn't do the work, but if they are willing to do that
16 and give me the exhaustive list, then I'm fine. But scanning
17 through it and saying, well, I think this is relevant, I think
18 this isn't relevant in part, this is not in the compromise,
19 this is not a part under the discovery requirements. They
20 were required to give me anything that was relevant anyway in
21 the process. So I don't see that as a compromise and I don't
22 part -- what I would say is that they gave me all of the
23 contacts that she's had with the community in not just this
24 investigation but any investigation that she's participated
25 in, that would be sufficient because those are the people I'm

1 trying to find. And, you know, it cuts out a step of work.
2 If they are willing to do that, then I don't need to do more
3 on it and we put that in our responsive letter on this.

4 I don't know what the government's position is.

5 THE COURT: Counsel, you want to add something?

6 MR. MAHER: I would, Judge. Mr. Swift filed his
7 motion under seal. I haven't even had an opportunity to see
8 it. It's not been made available to me, so as much as the
9 arguments he has raised are applicable to Ms. Velentzas, I
10 join that.

11 I also especially join his arguments against the
12 government's motion to close the courtroom at trial at all.
13 And just factually I just would note for the Court's
14 consideration, Ms. Velentzas has not only had family here
15 every Court appearance I believe, but she's also had friends,
16 members of her mosque and religious community and others who
17 have come to Court and I very much expect that people will be
18 coming to Court on her behalf who are not members of her
19 immediate family.

20 THE COURT: What do we have from the government?

21 MS. SASSO: Yes, Your Honor, just to sort of reframe
22 the first issue that's before the Court. The question is
23 really whether the defendant can adequately investigate her
24 case and prepare for trial without the proposal of splashing
25 en masse the identity of a counterterrorism undercover across

1 New York City.

2 There are two substantial government interests at
3 stake here: The safety of the undercover and the interest of
4 investigating national security in an ongoing manner.

5 The Court is required to consider both of those
6 interests and while Carmichael itself, which is a nonbinding
7 authority --

8 THE COURT: How do you answer the question as
9 counsel points out, CIPA pertains to discovery given to the
10 defendant and the information that they have was not given to
11 the defendant, they discovered it on their own.

12 MS. SASSO: Well, as a initial matter, Your Honor,
13 there is a process that the defense outlined in its papers in
14 so far as how they found the identity of the undercover. And
15 our law enforcement has attempted to recreate the search and
16 independently also find the identity the way that the defense
17 claims to have and they have been unable to do so. So there
18 is a question at the outset about what is actually public and
19 what was actually independently obtained without using any
20 material provided by the government. So that's just at the
21 threshold.

22 Regardless --

23 THE COURT: You're disputing the fact the
24 information that they have on this individual is the
25 undercover, that's what you're disputing.

1 MS. SASSO: Not whether it's the undercover, but
2 whether it was, in fact, independently obtained the way that
3 the defense represents it to be.

4 THE COURT: First of all, did the government give
5 the information that they say they have to the defendant?

6 MS. SASSO: The government has not provided the real
7 identity of the undercover to the defendant.

8 THE COURT: And the defendant now says they have
9 this information, it was not provided, as you say, to them by
10 the government, why shouldn't they be able to use it?

11 MS. SASSO: It appears that they have pieced
12 together various strands of information in order to get to the
13 real identity of the undercover. It is unclear to the
14 government whether that process, in fact, did involve some
15 strands of information that were provided by the government.
16 Running independent searches on the Internet, as the defense
17 represents that they have done, the government has not been
18 able to find the true identity of the undercover in the way
19 the defense says that they have. So there is a question as to
20 the process --

21 MR. SWIFT: I can break --

22 THE COURT: No, no. But the statute says
23 information that was provided by the government to the
24 defendant. And the defendant says no information was provided
25 to them by the government. The government says no information

1 was provided to the defendant by the government. Why
2 shouldn't they be able to use what they've discovered
3 independently?

4 MS. SASSO: Well, Your Honor, what I think we're
5 raising is the question as to whether they actually did
6 independently discover it. But even if they were to have
7 independently discovered it, the Court is still required to
8 consider under both the protective order and the law, the
9 interests in -- the government's interest at stake if they
10 were to try to move forward with this information. The
11 protective order requires that an application be made to this
12 Court, which is why we're here today --

13 THE COURT: Right.

14 MS. SASSO: -- in order for the Court to consider
15 what interests are at stake. And so this Court, even under
16 Carmichael, is required to consider the government's interest
17 and the public's interest and those are substantial here.

18 With the undercover safety matter, regardless of
19 whether certain information has been published about the
20 undercover, her image has not -- excuse me, the undercover's
21 image has not been published as the defense represents. So,
22 first of all, that would be new information that would be
23 provided to the public. Additionally, the real identity of
24 the undercover has not been distributed en masse or in public
25 media. So that would also be endangering information that the

1 defense would be providing to the public.

2 THE COURT: But what if the defendant published the
3 information they have?

4 MS. SASSO: That would create a substantial risk of
5 harm to the undercover as well as to the government's interest
6 in ongoing national security investigations. It would alert
7 past individuals, who may have been targeted by or interacted
8 with the undercover, that they were in fact targets of
9 investigations, and simply because they were past targets does
10 not mean that that they're not currently still under
11 investigation or could not be future targets, so those
12 individuals would be put on the alert that they had been under
13 investigation which could very well cause them to change the
14 way in which they operate.

15 THE COURT: What you are saying is that the
16 government has a national security interest and a personal
17 security interest?

18 MS. SASSO: That's correct.

19 THE COURT: What do you say about your application
20 to close the Court.

21 MS. SASSO: Your Honor, the same interests underlie
22 that application. The safety of the undercover and the
23 ability to conduct ongoing investigations are both implicated
24 by an open courtroom. And the approach that has been
25 requested here is very substantially tailored in order to meet

1 the rights of the defendant to have a public trial and to
2 confront the witness. The defendants would both be able to
3 confront in person, face-to-face the witness and any public
4 member observing the trial would be able to hear the live
5 audio feed of the testimony of the undercover while it's
6 happening and a transcript of that testimony would be
7 immediately released thereafter.

8 THE COURT: Put on the record exactly what you are
9 proposing for the closed court.

10 MS. SASSO: Your Honor, we are proposing that the
11 defendants and the defendants' family members be permitted to
12 be in a closed courtroom, able to examine the undercover live
13 time with no disguise or no concealment whatsoever of the
14 undercover.

15 We would propose that the audio testimony of the
16 undercover be live streamed into an outlet courtroom where any
17 member of the public who wishes to hear that testimony as it's
18 happening to listen to it.

19 Immediately thereafter we would request an expedited
20 transcript be produced of the undercover's testimony which
21 would be made available to the public.

22 So the only thing that the public would be deprived
23 of is the ability to see the undercover's face which, as I
24 mentioned, to date has not been publicized. The undercover's
25 face is not available on mass media, it has not been strewn

1 about and so that is an interest that the government still
2 would like to protect.

3 THE COURT: How do you explain the defendants say
4 they have copies of this picture of the undercover.

5 MS. SASSO: The defendants may have copies that they
6 obtained during their time with the undercover, but those have
7 not been distributed to date on the Internet or in any sort of
8 massive manner.

9 In this era of very global terrorism, if the
10 undercover's identity or photo were released in any form, if
11 they were posted on a bulletin board in a local mosque, in a
12 heartbeat that could be copied and distributed over the
13 Internet globally. So the risk here in a terrorism case is
14 substantially different than many other cases and the way that
15 the affidavit is structured, as Your Honor would have seen,
16 any sort of terrorism groups at play here are using the
17 Internet and using mass distribution of information in order
18 to target government informants and government undercovers and
19 law enforcement.

20 THE COURT: You want to comment on your offer to
21 compromise to show part of the file of the undercover to the
22 defendant?

23 MS. SASSO: Yes, Your Honor. As an initial matter
24 the government is not required to disclose that file or any
25 information about the undercover's prior operations, and the

1 government has proposed that certain parts of that information
2 be produced in this case as a courtesy and a compromise for
3 the defense. The government, having gone through those files,
4 believes that it is very clearcut in terms of what would be
5 relevant.

6 Giving actual identifying information about past
7 targets to the defense would create a substantial risk of harm
8 for ongoing national security investigations. It would put
9 past targets on the alert that they have been on any sort of
10 surveillance or counterterrorism investigation list and that
11 could cause them to change the way that they operate, making
12 them operate in a more covert manner and essentially able to
13 evade counterterrorism efforts. So the government does not
14 feel it is appropriate and, in fact, raises substantial risk
15 of harm to provide that particular information. However, the
16 government would be, should there be any close call, would be
17 amenable providing portions of those questionable materials to
18 the Court for an in camera review and determination as to the
19 relevance and the need to produce that to the defense.

20 THE COURT: Let me ask you this, Counsel, do you
21 have photographs of the person you say is the undercover?

22 MR. SWIFT: Yes, I do.

23 THE COURT: How did you obtain these?

24 MR. SWIFT: Through the Internet.

25 THE COURT: Okay. Anything else?

1 MS. SASSO: Your Honor, it's our understanding that
2 those photos have subsequently been removed by law enforcement
3 for the protection of the undercover.

4 THE COURT: Removed from where?

5 MS. SASSO: The Internet. They've been scrubbed off
6 by law enforcement so that photos are not currently available
7 online of the undercover.

8 THE COURT: But the defendants say they already have
9 them.

10 MS. SASSO: I believe they obtained that when there
11 was an initial kind of leak of a photograph, I believe they
12 were obtained during that window. Subsequently, law
13 enforcement quickly moved to remove those photographs, so they
14 have not been out on the Internet in this interim time period.

15 THE COURT: But they already have these photographs
16 and the government has not given it to them.

17 MS. SASSO: That's correct.

18 THE COURT: Anything else?

19 MR. SWIFT: Just to respond on the part on the
20 undercover. The government's position is essentially that I
21 can't investigate, that I can't go talk to people that she's
22 interacted with, that I can't conduct the type of criminal
23 investigation --

24 THE COURT: How do you know who she's interacted
25 with?

1 MR. SWIFT: How I find that out is I take her
2 picture around to the different areas in the community and say
3 has anybody met, known, did you know her, did you talk to her
4 on the process and I find those people. That's how I go out
5 and do an investigation and that part -- that's how I'm going
6 to go do it. If the government is unwilling to turn over the
7 people that I've found, I have a responsibility to go find
8 them. Because that's where I get the derogatory information
9 about a critical government witness, that's who I'm going to
10 get it from. I'm not going to get it from them.

11 MS. SASSO: Your Honor, we're not seeking to
12 proscribe the defense's ability to investigate entirely. The
13 reality of the matter is that the undercover has not used her
14 real -- excuse me, the undercover has not used the real
15 identity out in the course of investigations and so using the
16 real identity to inquire about the undercover is really
17 irrelevant and pointless, but also harmful. It's not as
18 though going out and using the real name is going to vet
19 someone who says, yes, I know that person by that person's
20 real name because past operations have never used that name.

21 THE COURT: All right, I got the argument, I am
22 going to reserve decision.

23 MS. SASSO: Thank you, Your Honor.

24 THE COURT: What date do you want? It will probably
25 be after the holidays.

1 MR. SWIFT: Late January.

2 MS. SASSO: Sometime in late January.

3 THE COURT: Give me a date, Ana.

4 THE COURTROOM DEPUTY: January 26th at 9:30.

5 MS. SASSO: And, Your Honor, because you have
6 previously designated this as complex, we would ask that time
7 be excluded.

8 THE COURT: Time is excluded. It is a complex case.

9 MS. SASSO: That it is.

10 MR. SWIFT: I think we can reach only one agreement,
11 but we can agree on that.

12 THE COURT: When this goes to trial how long did you
13 say it will take?

14 MS. SASSO: I think under two weeks.

15 THE COURT: All right.

16 MS. SASSO: Thank you, Your Honor.

17 MR. MAHER: One other thing, Your Honor, the hard
18 drive that was supposed to be fixed and given to Ms. Velentzas
19 at the MDC still has not been provided to her and it's been
20 months.

21 MR. SWIFT: And the same for my client.

22 THE COURT: What's the story on that?

23 MR. PRAVDA: Your Honor, we'll check on the status
24 and we'll reach out to Mr. Maher and let him know.

25 THE COURT: Do it like yesterday.

1 MR. PRAVDA: Yes, we will.

2 THE COURT: Who was supposed to do this?

3 MR. PRAVDA: Your Honor, it was going to the legal
4 personnel each at MDC and MCC who were then going to place it
5 an appropriate location within the facilities so that the
6 defendants would be able to access the hard drive.

7 THE COURT: Has it been done, given to the MDC?

8 MR. PRAVDA: That's what I'm going to check on, Your
9 Honor.

10 THE COURT: Okay, if you have any problems let me
11 know.

12 MR. MAHER: I will.

13 THE COURT: Okay.

14 MR. MAHER: Thank you.

15 MR. PRAVDA: Thank you.

16 (Matter concluded.)

17 * * * * *

18

19 I certify that the foregoing is a correct transcript from the
20 record of proceedings in the above-entitled matter.

21 s/ Georgette K. Betts

January 17, 2017

22 GEORGETTE K. BETTS

DATE

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